United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-4211

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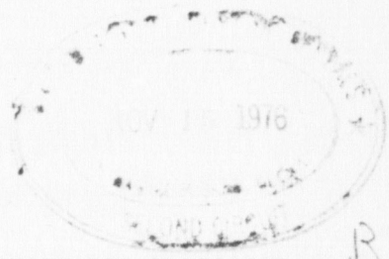

NORMAN and ARLENE RODMAN, et al Appellants-Cross-Appellees, v. COMMISSIONER OF INTERNAL REVENUE, Appellee-Cross-Appellant	PETITION FOR REHEARING IN BANC Docket No. 75-4211

TO THE HONORABLE JUDGES OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT:

The appellants, above named, present this, their petition for rehearing in banc of Court's September 17, 1976 opinion (No. 581--September Term, 1975, Lumbard, Waterman and Meskill), and, in support thereof, respectfully show:

1. The United States Tax Court (the "Tax Court"), held, among other things, in its 1973 Opinion, T. C. Memo. 1973-227, 32 T. C. M. 1307 (1973), and this Court affirmed, that the basis claimed by the appellants' joint venture for Torbrook Iron Ore Mines, Ltd. (Torbrook") stock sold in 1956 was overstated by $900,000. As a result, the 1956 income of the joint venture, including other adjustments, was increased to over $1,340,000.

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II. Under Internal Revenue Code Section 705 (a) (1) (A), the basis of each joint venture in his joint venture interest is increased by his share of the additional joint venture income. Therefore, since it is undisputed that the joint venture terminated by abandonment in 1958 and that the Tax Court record (limited by refusals to admit proffers of proof) did not show any distribution to the joint venturers during the entire period, the computation of tax should have allowed an ordinary abandonment loss to each joint venturer in 1958. This would be true even though the basis of each joint venturer in the joint venture at the beginning were zero.

III. Internal Revenue Code Subchapter K does not permit a negative basis nor did its 1954 reenactment change the statute regarding the character of a partner's gain or loss. Moreover, the capital gain provision of the Code is an exception to the normal tax provision and must be narrowly construed. Corn Products Refining Co. v. Commissioner, 350 U. S. 46, 76 S. Ct. 20 (1955), See also Mertens, Vol. 3B., par. 22,91.

IV. As stated in the Opinion of this Court, the Tax Court rejected the appellants' application to reopen the record to prove adjusted basis (which would also provide evidence that no distributions were made) and denied net operating losses (from the abandonment) on the theory that the appellants had not shown that the termination created an ordinary rather than a capital loss, despite a stipulation admitting 1958 ordinary losses and a reservation of the right to further proof of larger amounts. (See 1st stip. of facts items #20 and 24.) This Court held that there was no abuse of the Tax Court's discretion in refusing to reopen the record. At the same time, this Court, without

making a finding as to whether a capital or ordinary loss would be allowable, based its conclusion on the ground that there was "no proof that there was a total abandonment without some type of distribution." This Court further stated that it is possible to conclude from the facts in the record that cash was available and was distributed to the partners when the joint venture was terminated. There were no such facts in the record.

V. It is submitted that the above holding is erroneous since these cases were the subject of a thorough fraud investigation. It is logical to assume that if there were distributions (none were reported) to the appellants the fraud penalties would not have been abandoned by the appellee.

VI. This Court also alluded to other inferences and possibilities in holding that the Tax Court did not abuse its discretion in refusing to reopen the record. It is submitted that these inferences are not justified especially in view of the fact that the Tax Court based its ruling not on those inferences or evidence in the record but on alleged deficiencies in the record (which a reopening could remedy) and the legal principle that the loss on the abandonment would be capital rather than ordinary. The trial judge indicated his wish to get guidance from this Court upon remand as to the legal principle (See Tr.20).

VII. The requirement inherent in this Court's Opinion that the existing Tax Court record contain proof of a negative, i.e., that no distribution was made by the joint venture to the joint venturers, is unreasonable, especially in view of the failure to allow the reopening

of the record. An analagous situation would be where a Tax Court determination decreased adjusted gross income of a taxpayer and upon a Rule 155 computation the right to increase a medical deduction by reducing the 3% exclusion would be denied because the record failed to prove the medical expenses.

VIII. The opinion of this Court is inconsistent in disregarding the deficiency in the record in proving that there were losses because of failure to prove the joint venturers' bases in partnership interest and yet hold that there was "no proof that there was a total abandonment without some type of distribution". It is noted also that this Court stated that the Tax Court would apparently have reopened the record but for its conclusion that any losses caused by the termination of the partnership would have been capital losses". (See this Court's footnote 11).

IX. This Court has not resolved the issue whether a loss from the abandonment of a partnership interest where no distribution is received by a partner results in an ordinary or capital loss. It is submitted that there is no statutory basis for holding that a capital loss results. Since the 1954 Internal Revenue Code contains no such provision, the pre-1954 cases remain as proper authority. Furthermore, the case of Zeeman v. United States, 275 F. Supp. 235 (SDNY 1967), aff'd and remanded on other issues, 395 F.2d 861 (2d Cir. 1968), under the 1954 Code, lends weight to the legal principle that the abandonment of a partnership interest, as would be true of the abandonment of other capital assets, results in an ordinary loss.

X. To summarize,

(1) It is not reasonable to require proof of a negative;

(2) In any event, there is no justification for refusal to allow the reopening of the record, especially since the case is being remanded anyway on another issue; and

(3) An ordinary loss should be allowed to each joint venturer equal to the basis of each joint venturer's interest, computed on the basis of the Tax Court's own determination of joint venture income. This would mean, at the very least, starting with a zero basis as of the beginning of 1956

(4) Delving in alleged factual inference upon alleged factual inference that there was a distribution from the joint venture to the joint venturers is not in law or in fact ground for establishing the Tax Court's failure, due to a legal holding, to allow the appellants loss carrybacks of their respective adjusted capital interests from 1958 to 1956. It is for the Tax Court and not this Court to draw inferences from established facts, and not for any Court to indulge in the "superimposition of inferences one upon another so abhorrent to American Law." Cronin's Estate v. Commissioner of Internal Revenue, 164 F2d 561 (6 Cir. 1947)

WHEREFORE, for all the reasons set forth above and the record previously submitted and on file with this Court, it is respectfully submitted that appellants' petition be granted and that this Court sit in banc to rehear the question of whether the Tax Court's refusal to reopen the record for proof of the 1958 ordinary losses and to allow the carryback of said losses was a substantial error of law.

Respectfully submitted,

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November 15, 1976

Certificate of Service

It is hereby certified that service of this petition has been made on opposing counsel by mailing three copies thereof on this 15th day of November, 1976, in an envelope, with postage prepaid, properly addressed to him as follows:

David E. Carmack, Esq.
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Washington, DC 20530

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